Supreme Court of the United States

October Term, 1958

No. 180

WILLIAM L. GREENE,

Petitioner,

vs.

NEIL M. McELROY, THOMAS S. GATES, JR. and ROBERT B. ANDERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

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Interest of *Amicus Curiae*

The American Civil Liberties Union is submitting this brief with the written consent of both parties, filed with the Clerk of this Court. The Union has been gravely concerned over the alarming extent to which the suppression of basic liberties and the corruption of historic safeguards have replaced legitimate police and judicial procedures required to safeguard the security of the country. We therefore stand against guilt by association, judgment by accusation, the invasion of the privacy of personal opinions and beliefs, and the confusion of dissent with disloyalty—all of which are characteristic of the totalitarian tyrannies we abhor. The abuse by wrongful un-American methods of the rightful national aim to safeguard the security of the country, not only betrays the noblest traditions of our history but also impairs our capacity for leadership of free peoples at this crucial time for freedom in the world. Civil liberties,

born of centuries of the people's struggle for dignity and freedom, are a basic part of man's heritage. Freedom of religion, thought, communication, assembly, dissent, freedom from discrimination, and the right to due process of law are highly prized parts of the American heritage.

We are interested in this case because we believe that the "hearing" afforded petitioner in the administrative proceedings below was a "sham" hearing only. In our view, the decision of the court below must be reversed for the following reasons:

(1) The Defense Department's criteria for judgment are unconstitutionally vague and uncertain, and the procedures employed did not afford petitioner those maximum safeguards which could have been afforded him without impairing the national security;

(2) Reliance by the Defense Department's Industrial Personnel Security Boards on *non-secret* but so-called "confidential information," the nature, substance and source of which was undisclosed to petitioner was a denial of administrative due process; and

(3) Failure to permit petitioner to confront and cross-examine *casual,* but so-called "confidential informants"[1] who supplied the adverse information relied on by the Appeal Division, Eastern Industrial Personnel Security Board, violated all the essential elements of fairness required in a proceeding of this type.[2]

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[1] *I.e.,* maiden-aunts, neighbors and casual busybodies who are neither professional agents nor under-cover informants within the Communist apparatus.

[2] It is the Union's position that petitioner was entitled to confront and cross-examine all the witnesses who supplied the adverse information upon which the Defense Department's Industrial Personnel Security Boards relied. Even a professional or "under-cover" agent's testimony "might have been caused by a psychiatric condition." *Mesarosh* v. *United States,* 352 U. S. 1, 8. However, for the purposes of this case we need go no further than the position expressed above.

Statement of the Case

A. Petitioner

Prior to April 17, 1953, petitioner was Vice President in charge of engineering and General Manager of Engineering and Research Corporation, a firm engaged in the production of highly secret defense materials for the Department of Defense. At that time he held clearances for access to classified materials ranging from "confidential" to "secret."[3] On April 17, 1953, the Secretary of the Navy revoked petitioner's clearance for access to classified material on the ground that continued access "is inconsistent with the best interests of national security" (R. 2-3).

B. Administrative Proceedings

Upon petitioner's request for reconsideration or, in the alternative, a hearing, the Navy Department requested the Eastern Industrial Personnel Security Board on October 13, 1953, to accept jurisdiction of his case (R. 21). On March 20, 1954, petitioner's counsel requested the Executive Secretary, EIPSB, to furnish him a copy of the "statement of reasons," as provided by Section 16d of the EIPSB's regulations (R. 178-181).[4]

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[3] *Greene* v. *McElroy* (C. A. D. C.), 254 F. 2d 944, 946, fn. 1.

[4] Section 16d of the Industrial Personnel and Security Facility Clearance Regulations provided: "If the Screening Division concludes on the basis of the entire file and in accordance with the standard and criteria set forth in Section III that the case does not warrant a security finding favorable to the contractor or contractor employee, it will, in collaboration with the Security Advisor and the Legal Advisor, prepare a notice of proposed denial or revocation of clearance and a Statement of Reasons which will be as specific and detailed as, in the opinion of the Screening Division, security considerations permit, in order to provide the contractor or contractor employee with sufficient information to prepare a reply." Appendix "A", *infra*, p. 33.

On April 9, 1954, petitioner was furnished with a statement of reasons [5] and after a hearing before the Appeal

[5] "Security considerations permit disclosure of the following information that has thus far resulted in the denial of clearance to Mr. Greene:

"1. During 1942 SUBJECT was a member of the Washington Book Shop Association, an organization that has been officially cited by the Attorney General of the United States as Communist and subversive.

"2. SUBJECT's first wife, Jean Hinton Greene, to whom he was married from approximately December 1942 to approximately December 1947, was an ardent Communist during the greater part of the period of the marriage.

"3. During the period of SUBJECT's first marriage he and his wife had many Communist publications in their home, including the 'Daily Worker'; 'Soviet Russia Today'; 'In Fact'; and Karl Marx's 'Das Kapital'.

"4. Many apparently reliable witnesses have testified that during the period of SUBJECT's first marriage his personal political sympathies were in general accord with those of his wife, in that he was sympathetic towards Russia; followed the Communist Party 'line'; presented 'fellow-traveller' arguments; was apparently influenced by 'Jean's wild theories'; etc.

"5. In about 1946 SUBJECT invested approximately $1000. in the Metropolitan Broadcasting Corporation and later became a director of its Radio Station WQQW. It has been reliably reported that many of the stockholders of the Corporation were Communists or pro-Communists and that the news coverage and radio programs of Station WQQW frequently paralleled the Communist Party 'line'.

"6. On 7 April 1947 SUBJECT and his wife Jean attended the Third Annual Dinner of the Southern Conference for Human Welfare, an organization that has been officially cited as a Communist front.

"7. Beginning about 1942 and continuing for several years thereafter SUBJECT maintained sympathetic associations with various officials of the Soviet Embassy, including Major Constantine I. Ovchinnikov, Col. Pavel F. Berezin, Major Pavel N. Agseev, Col. Ilia M. Saraev, and Col. Anatoly Y. Golkovsky.

"8. During 1946 and 1947 SUBJECT had frequent sympathetic association with Dr. Vaso Syrzentic of the Yugoslav Embassy. Dr. Syrzentic has been identified as an agent of the International Communist Party.

Division, EIPSB, on April 28, 29 and 30, 1954 (R. 182-461), petitioner was notified that the Appeal Division had determined that "on all the available information, the granting of clearance to you for access to classified information is not clearly consistent with the interests of national security" (R. 462-463).[6] On June 4, 1954, petitioner's counsel

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"9. During 1943 SUBJECT was in contact with Col. Alexander Hess of the Czechoslovak Embassy, who has been identified as an agent of the Red Army Intelligence.

"10. During 1946 and 1947 SUBJECT maintained close and sympathetic association with Mr. and Mrs. Nathan Gregory Silvermaster and William Ludwig Ullman. Silverman and Ullman have been identified as members of a Soviet Espionage Apparatus active in Washington, D. C., during the 1940's.

"11. SUBJECT had a series of contacts with Laughlin Currie during the period 1945-48. Currie has also been identified as a member of the Silvermaster espionage group.

"12. During the period between 1942 and 1947 SUBJECT maintained frequent and close associations with many Communist Party members, including Richard Sasuly and his wife Elizabeth. Bruce Waybur and his wife Miriam, Martin Popper, Madeline L. Donner, Russell Nixon and Isadora Salkind.

"13. During substantially the same period SUBJECT maintained close association with many persons who have been identified as strong supporters of the Communist conspiracy, including Samuel J. Rodman, Shura Lewis, Owen Lattimore, Ed Fruchtman and Virginia Gardner." (R. 9-11).

[6] Petitioner and others had testified that (1) he joined the Washington Bookshop Association in 1942 in order to obtain discount privileges (R. 204); (2) during the period of his marriage to Jean Hinton, he did not know or have reason to know that she was a Communist Party member (R. 403-404, 457); (3) he did not subscribe to any of the communist publications named although he may have seen "between five or ten" issues of the "Daily Worker" in his home (R. 217-218); (4) he did not sympathize with his ex-wife's political views and was not and had never been a member of the Communist Party or a Communist Party Sympathizer (R. 219-222, 226-267); (5) he invested $1,000. in Station WQQW because the believed it was a good investment and he liked classical music (R. 243-244, 438-439); (6) at the time he attended the Third Annual Dinner of the Southern Conference for Human Welfare all he knew about it "was that it was an organization that was trying to promote

requested a statement of the Appeal Division's *findings* as required by Section 20 of the EIPSB regulations which were "essential for the preparation of the petition for reconsideration contemplated by Section 20e of the regulations * * * " (R. 464).[7] However, on June 9, 1954, petitioner's counsel was informed that:

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the wealth and industry in the South and that a lot of prominent people belonged to it * * * * " (R. 242); (7) his contacts with officials of the Soviet Embassy had to do with the sale of a propeller and a non-military type airplane on behalf of the Company for which he was employed (R. 257-266, 419-422); (8) the only contacts he had with Dr. Vasa Syrzentic were in connection with a contract proposal for an engineering study of the Yugoslav lumber industry R. 240-242, 418-491); (9) his sole contact with Col. Hess occurred in 1942 and was arranged for the purpose of selling his firm's equipment to the Soviet government during the period 1942-1946. Col. Hess was cashiered from the Czechoslovakian Army in 1948 and is presently employed by Pan American Airlines in the United States (R. 259-265); (10) he was acquainted with the Silvermasters and was friendly with Ullman whom he got to know through his ex-wife but the first knowledge he had of their espionage activities or that they were members of the Communist Party occurred from newspaper reports in 1948, some time after he had seen them for the last time (R. 201-203, 206-210, 384-385, 392, 425-429); (11) he was employed by Dr. Currie in the capacity of an engineering consultant at the rate of $100. per day, but did not know of his espionage activities until the summer of 1948 which was at least six months after his last contact with Dr. Currie (R. 222-227, 459); (12) and (13) he became acquainted with these people through his ex-wife, but did not know they were Communist party members (R. 205-206, 210-216, 236-240). Twelve witnesses testified in petitioner's behalf. Under oath and cross-examination they stated that petitioner was a loyal citizen, had never indicated any communist sympathies, was careful about protecting the integrity of classified defense information and in their opinion was a "good security risk." (R. 232, 250, 271, 292, 298, 300, 314, 330-331, 335-336, 343, 356-357, 371, 391, 398-399).

[7] Section 20e of the Industrial Personnel and Facility Security Clearance Regulations provided: "Decisions of the Appeal Division shall be final, subject only to reconsideration on its own motion or at the request of the appellant for good cause shown or at the request of the Secretary of any military department." Appendix "A", *infra*, p. 34.

> "Security considerations prohibit the furnishing to an appellant of a detailed statement of the findings on appeal inasmuch as the entire file is considered and comments made by the Appeal Division panel on security matters which could not for security reasons form the basis of a statement of reasons." (R. 465)

C. Administrative Proceedings Subsequent to the Filing of Suit

On August 24, 1954, petitioner filed a complaint in the District Court for the District of Columbia seking to invalidate the revocation of his security clearance (R. 1). After the filing of an answer on December 21, 1954 (R. 25), petitioner requested that the Industrial Personnel Security Review Board review his case pursuant to Department of Defense Directive 5220.6, par. 24b (R. 465-466).[8] On March 12, 1956, petitioner's counsel was advised by Jerome D. Fenton, Director, Office of Industrial Personnel Security Review, that the Review Board had entered its determination in the matter "which affirms the decision of the Eastern Industrial Personnel Security Board entered on May 10, 1954 * * * that, on all the evidence, Mr. Greene's access to classified information is not clearly consistent with the interests of national security" (R. 22-23).

Mr. Fenton further advised petitioner's counsel as follows:

> "In reaching this determination, the Review Board reviewed the findings of the Eastern Industrial Personnel Security Board, in accordance with its mandate under the above regulations, and determined that there was substantial support for said

[8] On February 2, 1955, the Industrial Personnel & Facility Security Clearance Directive of May 4, 1953, was superseded by the Industrial Personnel Security Review Regulation issued by the Secretary of Defense. *Dept. of Defense Dir.* 5220.6. This regulation established new screening, hearing and review boards, including the Industrial Personnel Security Review Board. Appendix "B", *infra*, p. 35.

findings in the evidence and other material before the Review Board.

* * *

"6. That Mr. Greene's credibility as a witness in the proceedings before it was doubtful.

"In reaching its determination in this case, the Review Board concluded, on the basis of the above findings, that Mr. Greene had been in close contact with a number of individuals who were either trusted officials of the Soviet Union or members of the Communist Party actively engaged in its work; that these associations were undertaken and continued with knowledge of the sympathies and activities of these individuals; and that he has been sympathetic towards the Communist Party and the Communist movement.

"In addition, the Appeal Division, Eastern Industrial Personnel Security Board, had strong doubts as to Mr. Greene's credibility as a witness. These doubts were shared by the Review Board. This lack of credibility goes to the heart of the concept of trustworthiness, upon which all security clearances ultimately rest.

"Longstanding policy has dictated that only those persons who are determined to be trustworthy shall have access to classified information (for the latest expression see EO 10501). The Review Board found that such a determination could not be made in Mr. Greene's case, and, therefore, that the decision of the Appeal Division, Eastern Industrial Personnel Security Hearing Board, must stand. (R. 23-24)[9]

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[9] The other findings were:

"1. That during the period from 1942 to 1947, knowing of their activity on behalf of the Communist Party and sympathizing with it, Mr. Greene associated closely with his ex-wife, Jean Hinton, Mr. and Mrs. Richard Sasuly, Mr. and Mrs. Bruce Waybur, Martin Popper, Russell Nixon, Isadore Salkin, Shura Lewis, and Samuel J. Rodman, all of whom were members of the Communist Party or active in its behalf.

"2. That in 1946 and 1947, knowing of their sympathy for the Communist Party, Mr. Greene associated closely with Mr.

D. Court Proceedings

An amended and supplemental answer was filed by the respondents on October 8, 1956 (R. 12). On October 10, 1956, the parties filed a stipulation of facts (R. 27-31). And on April 8, 1957 on cross-motions for summary judgment, the district court granted respondents' motion and dismissed the complaint (R. 476-479). A notice of appeal was filed May 13, 1957 (R. 480), the Court of Appeals for the District of Columbia affirming April 17, 1958 (R. 480-496). A petition for certiorari was filed in this Court on July 16, 1958, and certiorari was granted October 7, 1958 (R. 497).

Summary of Argument

Introductory Statement

The two key issues of this case were never decided by the court below. They are: (1) whether, in the circumstances of this case, the procedures employed afforded petitioner the maximum procedural safeguards he could have been furnished without jeopardizing the national security; and (2) whether the Defense Department's criteria for determining a "security risk" are so uncertain that no

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and Mrs. Nathan Gregory Silvermaster, William Ludwig Ullman, and Lauchlin Currie, all of whom have engaged in espionage on behalf of the Soviet Union."

"3. That for a number of years beginning in 1942, Mr. Greene maintained a sympathetic association with a number of officials of the Soviet Embassy, as set out in the Statement of Reasons furnished to him.

"4. That from 1942 to 1947 Mr. Greene's political views were similar to, and in basic accord with, those of his ex-wife, Jean Hinton.

"5. That Mr. Greene was a member of the Washington Book Shop Association; invested money in and became a director of the Metropolitan Broadcasting Corporation; attended a function of the Southern Conference for Human Welfare; and had in his home a number of Communist publications as set out in the Statement of Reasons furnished to him." (R. 23-24).

ascertainable standard for judgment is provided. On the first issue, the Court of Appeals held that the Government was not required to choose between disclosing the identity of "confidential informants" and giving an employee access to highly secret defense information (254 F. 2d, at pp. 950-952). And on the second, it said that it was "not called on to decide whether * * * the regulations * * * in this field are in every particular or in every possible situation valid and effective" (254 F. 2d, at p. 950).[10]

The question which the Court of Appeals did undertake to decide (*i.e.*, whether the Government was required to choose between disclosing the identity of confidential informants and granting an employee access to highly secret defense information), was completely irrelevant to a decision below. Here, it is perfectly apparent that the Government was, and is, not required to make that choice. Since, at the very least, "due process" under the Industrial Personnel Security Program must be defined in terms of the maximum procedural safeguards petitioner could have been afforded without jeopardizing the national security, respondents were required to furnish him the *non-secret* contents of the "classified" investigative file and to permit him to confront and cross-examine those "neighbors, maiden-aunts and casual busybodies" who either testified against him or otherwise supplied the derogatory information upon which the adverse determination was made.

I

The major issue in this case turns on the constitutionality of paragraph 4 of the Defense Department's Industrial Personnel and Facility Security Clearance Regulation. Paragraph 4 provides that "no classified information, nor information which might compromise investiga-

[10] Nevertheless, the validity of the criteria was squarely raised. See Appellant's Brief, pp. 35-37; Appellees' Brief, pp. 30-32, *Greene v. McElroy* (C. A. D. C.), No. 13978.

tive sources or methods or the identity of confidential informants, will be disclosed to any * * * employee * * *." Appendix "A", *infra*, at p. 29. This provision precluded petitioner (1) from obtaining the non-secret contents of the "classified" investigative file, and (2) from confronting and cross-examining anonymous accusers who were neither professional nor "under-cover" informants. While perhaps the Government is not required to choose between disclosing the identity of professional or under-cover agents and giving an employee access to highly secret defense information, *it was not faced with that choice in this case.* In our view, the professional or "under-cover" informant engaged in obtaining intelligence and internal security information for the Government must be separated from those who have no legitimate reason for secrecy, and as to the latter, we think petitioner had a right to confront and cross-examine them. Moreover, respondents made no "finding" (or claim of privilege) that the disclosure of such information would compromise investigative sources and methods. And in any event, such a "finding" would be insufficient—it could not be made to cover a refusal to disclose the identity of a *casual* informant or the contents of the *non-secret* information in the "classified" investigative file.

II

If "due process" in this case is defined in terms of the maximum procedural safeguards which petitioner could have been afforded without jeopardizing the national security, it is immediately apparent that the Eastern Industrial Personnel Security Board's denial of a statement of its *findings* "essential to the preparation of the petition for reconsideration contemplated by Section 20e of the regulations * * * " (R. 464) on the ground that "security considerations prohibit[ed]" it (R. 465), deprived petitioner of any "meaningful review" by the Industrial Personnel Security Review Board. Since the very findings which petitioner was denied because of "security considerations"

on June 9, 1954 were furnished him in the adverse decision of the Industrial Personnel Security Review Board on March 12, 1956 (R. 23-24), petitioner was prevented from obtaining a "meaningful review" of such findings for reasons which simply did not apply to his case.

III

We may assume that the Federal Government may create and administer an Industrial Security screening program. We may also assume that pursuant to such a program, the Government may establish a standard for determining when an employee is a "security risk" and also criteria to guide administrative officials in arriving at a reasoned judgment under it. Nevertheless, there must be some rational connection between the criteria establishing a classification under the standard and the standard itself. In the instant case, not only is the standard (*i.e.*, revocation of security clearance required if "the granting of such clearance is not clearly consistent with the interests of national security") void for vagueness, but the applicable criteria bear no rational connection to it.

ARGUMENT

I

Respondents' Action Was Taken in Violation of Due Process of Law

Paragraph 4 of the Industrial Personnel and Facility Security Clearance Regulation provided that "[n]o classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any * * * employee * * *." Appendix "A," *infra*, at p. 29. Under this provision petitioner was denied an opportunity to confront and cross-examine not only "confidential inform-

ants," *i.e.*, professional or "under-cover" informants,[11] but also any person who may have supplied derogatory information against him.[12] In addition, he was prohibited from obtaining the non-secret *contents* of the "classified" investigative file.[13]

The court below pointed out that "the only sanction the courts could employ against the Government for failure to disclose all the information against Greene would be to declare the revocation of Greene's clearance invalid. * * * [This] would amount to ordering his restoration to access to classified information [which] in turn would require the executive to disclose a state secret to Greene * * *. No court has yet forced the Government to choose between such alternatives—either of which might compromise the security of the country." 254 F. 2d, at p. 951. But the Government was not required to make that choice. In our view the intelligence agent must be separated from the envious co-worker, the hysterical ex-wife and the unfriendly neighbor next door, since in the case of the latter, confrontation and cross-examination pose no conceivable compromise of the "national security." If it be claimed that the private citizen would then be unwilling to supply testimony important to the safety of the Nation, Congress has ample authority to give Industrial Personnel Security Boards the power of *subpoena*. See, *Report of Commission on Government Security*, 285-289, 657-664 (1957).

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[11] Herbert Philbrick is perhaps the best example of this kind of informant.

[12] See, *e.g.*, Charge No. 4 in the Statement of Reasons: *"Many apparently reliable witnesses* have testified that during the period of SUBJECT's first marriage his personal political sympathies were in general accord with those of his wife, in that he was sympathetic towards Russia; followed the Communist Party 'line'; presented fellow traveler arguments; was apparently influenced by 'Jean's wild theories'; etc." (R. 10). [Emphasis supplied]

[13] See, Transcript of Hearing before Appeal Division, Eastern Industrial Personnel Security Board. (R. 402-461).

At the very least, "due process" under the Industrial Personnel Security Program must be defined "in terms of the maximum procedural safeguards which can be afforded [petitioner] without jeopardizing the security program." *Parker* v. *Lester* (N. D., Cal.), 112 F. Supp. 433, at p. 443. Thus, while the investigative file was undoubtedly marked "classified," petitioner was nevertheless entitled to examine its *non-secret* contents. See, *Deak* v. *Pace* (C. A. D. C.), 185 F. 2d 997; *United States* v. *Gray* (9 Cir.), 207 F. 2d 237, 242. For these same reasons, the Industrial Personnel Security Program is in no way jeopardized when the Government is required to separate the professional or "under cover" agent from the casual informant having no legitimate reason for secrecy, affording confrontation and cross-examination of the latter. See, Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, at pp. 212-214, 233-243 (1956); Donovan & Jones, *Program for a Democratic Counter Attack to Communist Penetration of Government Service*, 58 Yale L. J. 1211, at pp. 1234-1235 (1949).

The Government has refused to meet this rational challenge to its Industrial Personnel and Facility Security Clearance Regulations; instead, it has attempted to obscure judicial consideration of the real problem.[14] But since it is inextricably intertwined in the administration of a Federal

[14] In its Brief in Opposition to the Petition for Certiorari, No. 180, U. S. Sup. Ct., October Term, 1958, respondents said: "* * * the relief sought *would necessarily require disclosure, under compulsion of law, either of classified military contracts or of equally confidential investigation reports (possibly revealing, for example, the identity of informers within the communist apparatus)*. * * * The result of requiring the Government to grant the petitioner access to classified information unless it is willing to disclose the identity of its informers is, as noted above, necessarily to force disclosure of one of the two types of confidential information. *The suggestion that the Government is under a constitutional compulsion to choose one of these two compromises of the national security is surely without merit.*" *Id.*, at pp. 10-11, 17-18. (Emphasis supplied.)

loyalty-security program covering more than three million employees in twenty-one thousand defense facilities throughout the United States, [15] we think it no answer for respondents to place themselves between *Scylla* and *Charybdis* in an attempt to avoid meeting it.

Two basic issues are involved here. The first is whether petitioner is entitled to the non-secret contents of the "classified" investigative file. The second, whether he is permitted to confront and cross-examine those of his accusers who are not professional or "under-cover" informants. In putting these issues into sharper focus, we think the Court may find the practical effect of the challenged procedures illuminating. For this reason we have appended our brief *amicus curiae* in *Peters* v. *Hobby*, 349 U. S. 331, which demonstrates the practical effect of the denial of "procedural due process" on those involved in loyalty-security proceedings. See, Appendix "C", *infra*, at pp. 38-53. A demonstration of actual instances of proven injustice and false and fantastic accusations leveled against individuals involved in situations similar to petitioner's may enable this Court to evaluate more fully the real meaning of the issues posed by this case.

In *Dayton* v. *Dulles* (C. A. D. C.), 254 F. 2d 71, reversed on other grounds, 357 U. S. 144, the Court of Appeals upheld a passport denial based on confidential information where the Secretary of State specifically found that "to disclose publicly the sources and details of this information would * * * [compromise] investigative sources and methods and seriously [interfere] with the ability of the * * * Executive Branch to obtain reliable information affecting our internal security * * * [and] to obtain and utilize information from sources abroad and * * * [would interfere with] established relationships in the security and

[15] Note, *The Role of Employer Practices in the Federal Industrial Personnel Security Program—A Field Study*, 8 Stanford L. Rev. 234, 244 (1956).

intelligence area." *Id.*, 254 F. 2d, at p. 73. No such finding was made here. But in any event, it could not be made to cover a refusal to disclose the identity of a casual informant having no legitimate reason for secrecy, *United States* v. *Reynolds*, 345 U. S. 1, 7-11, or the contents of non-secret information in the "classified" investigative file. Compare, *United States* v. *Heine* (2 Cir.), 151 F. 2d 813, cert. den., 328 U. S. 833. See also, Donovan & Jones, *Program for a Democratic Counter Attack to Communist Penetration of Government Service*, 58 Yale L. J. 1211, at pp. 1234-1235 (1949).

Our view is fully supported by the *Report of The Commission on Government Security*:

> "Confrontation of persons who have supplied derogatory information should be allowed to the maximum extent consistent with the protection of the national security and as provided below:
>
> "1. Confrontation of regularly established confidential informants engaged in obtaining intelligence and internal security information for the Government should not be allowed where the head of the investigative agency determines that the disclosure of the identity of such informants will prejudice the national security. In such cases the report supplied by the investigative agency should contain as much of the information supplied by the informant as may be disclosed without revealing the identity of the informant and without otherwise endangering the national security.
>
> "(a) If confrontation is not permitted under paragraph 1, the hearing examiner should furnish the individual involved with the substance of the information obtained from such informant to the extent that such information is material to the consideration of the issues involved; and should read into the record the substance of such information and the evaluation as to reliability placed upon such confidential informant in the investigative report.
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> * * *

> "2. (a) Derogatory information supplied by confidential informants other than those described in paragraph 1 should not be considered, over the objection of the individual involved, by any hearing examiner in arriving at his determination, or by any officer charged with the responsibility for making a final decision as to retention of an employee or as to clearance, unless such informants consent to the disclosure of their identity so as to enable the individual involved to obtain their testimony through the issuance of a subpoena or by depositions orally or on written interrogatories." *Id.*, at pp. 66-67

Accordingly, we think it clear that paragraph 4 of the Industrial Personnel and Facility Security Clearance Regulation, to the extent it prohibited petitioner from (1) being furnished the contents of the derogatory information against him and (2) confronting and cross-examining those *casual*, but so-called "confidential" informants who supplied that information, is violative of the Fifth Amendment to the Constitution.

II

Respondents Did Not Furnish Petitioner the Maximum Procedural Safeguards He Could Have Been Afforded Consistent with the National Security.

If "due process" under the Defense Department's Industrial Personnel Security Program is defined in terms of the maximum procedural safeguards which petitioner could have been afforded without jeopardizing the national security, it is immediately apparent that respondents' action violated procedural due process in a number of salient respects. One of the more glaring violations is that on June 9, 1954, the Eastern Industrial Personnel Security Board denied petitioner a statement of its *findings* "essential to the preparation of the petition for reconsideration contemplated by Section 20e of the Regulations * * *" (R. 364)

on the ground that "security considerations prohibit[ed]" it (R. 465). Yet, these very same findings were furnished him on March 12, 1956, in the adverse decision of the Industrial Personnel Security Review Board (R. 23-24). Respondents' action was arbitrary and deprived petitioner of any "meaningful review" by the Industrial Personnel Security Review Board.

On February 2, 1955, the Secretary of Defense promulgated Department of Defense Directive 5220.6 which superseded the previous Industrial Personnel and Facility Security Regulations applicable to petitioner's case. On September 16, 1955, petitioner's counsel requested a review of the adverse determination of the Appeal Division, Eastern Industrial Personnel Security Board, on the ground that the decision sought to be reviewed "was contrary to the facts and involved a misapplication and misinterpretation of the criteria for determining the existence of a security risk" (R. 465).[16] On November 1, 1955, the adverse determination of the Appeal Division, Eastern Industrial Personnel Security Board, was forwarded to the Industrial Personnel Security Review Board under the provisions of Section 21b(2) of Department of Defense Directive 5220.6 (R. 23).[17] Once a case has been forwarded to the Industrial Personnel Security Review Board under paragraph 21 of the Directive, that Board is required to "review each case submitted to it on the written record" and to make its determination in accordance with the standards and criteria set forth in the regulations. The Review Board is also authorized to adopt, modify or reverse the findings or the de-

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[16] Department of Defense Directive 5220.6, par. 24b provides: "Decisions of the Army-Navy-Air Force Personnel Security Board and of the Screening Divisions of the Eastern, Central and Western Industrial Personnel Security Boards which denied or revoked a clearance may be considered by the Screening Board at the request of the person concerned, addressed through the Director, for good cause shown." Appendix "B", *infra*, at p. 37.

[17] Appendix "B", *infra*, at p. 36.

termination of the Hearing Board. *Department of Defense Directive 5220.6*, par. 22a; Appendix "B," *infra*, at p. 36. Thus, while petitioner was afforded the right of appeal to the Industrial Personnel Security Review Board from the adverse decision of the Appeal Division, Eastern Industrial Personnel Security Board which had denied him clearance, the action of the Eastern Industrial Personnel Security Board on June 9, 1954, deprived petitioner of any "meaningful review" by the Industrial Personnel Security Review Board under Section 22 of the Directive. See, *Gonzales* v. *United States*, 348 U. S. 407, 412-415. While *Gonzales* involved a draft registrant's right to file a statement with the Appeal Board from an "adverse advisory recommendation" of the Department of Justice's "auxiliary-type hearing," this Court nevertheless required the registrant to have an opportunity to rebut the adverse advisory recommendation when it came before the Appeal Board, since this was the only means of insuring that the Appeal Board would have all of the relevant data before it. The procedure involved in *Gonzales, supra*, is virtually "on all fours" with the procedure set forth in Department of Defense Directive 5220.6.[18]

Other glaring examples of violations of maximum procedural safeguards appear on the record as follows:

> "Q. I'd like to read to you a quotation from the testimony of a person who had identified himself as having been a very close friend of yours over a long period of years. He states that you, as saying to

[18] The thrust of petitioner's argument to the Review Board was that the EIPSB "[misapplied] and [misinterpreted] the criteria for determining the existence of a security risk" (R. 465). But the crucial finding made by the EIPSB was "6. That Mr. Greene's credibility as a witness in the proceedings before it was doubtful * * * [which] goes to the heart of the concept of trustworthiness, upon which all security clearances ultimately rest" (R. 24). "If petitioner had been afforded a copy of the [findings], he might have successfully contradicted the basis of the [EIPSB's] conclusion or diminished the forcefulness of its thrust." *Gonzales* v. *United States*, 348 U. S. 407, 413.

him one day that you were reading a great deal of pro-Communist books and other literature. Do you wish to comment on that? A. I can't imagine myself making a statement like that. * * *" (R. 409-410)

* * *

"Q. * * * Here's another man who indicates that he has been a friend of yours over a long period of time who states that he was a visitor in your home on occasions and that regarding some of these visits, he met some of your wife's friends, these people we've been talking about in the past and that one occasion, he mentioned in particular, the topic of conversation was China and that you set forth in the conversation and there seemed general agreement among all of you at that time that the revolutionists in China were not actually Communists but were agrarian reformists which as you probably know is part of the Communist propaganda line of several years back. This man further stated that he considered you misguided in your political views at that time but since the termination of your first marriage, you've completely changed in this respect. Do you wish to offer any comment on that before I go on? A. Well, my wife may have told me that they were agrarian reformers. I wasn't interested in the problem particularly and if there was a conversation about it, I wasn't going to start a fight about something I didn't know. I didn't know what they were. * * *" (R. 410-411)

* * *

"Q. We have a statement here from another witness with respect to yourself in which he stated that you felt that the modern people in this country were too rich and powerful, that the capitalistic system of this country was to the disadvantage of the working people and that the working people were exploited by the rich. A. I can't believe that I ever made that statement because I spent all my life trying to make the maximum amount of money that I could." (R. 412-413)

* * *

"Q. I have a statement from another one of your associates to the effect that you would at times, pre-

sent to him a *fellow-traveler argument.* This man indicated to us that he was pretty well versed on the Communist Party line himself at that time and found you parroting arguments which he assumed that you got from your wife. Do you wish to comment on that? A. I really don't know what a fellow-traveler argument would be * * *. I just don't know what you mean by that. * * *." (Emphasis supplied.) (R. 413)

"Q. We have information here, this has come from an informant characterized to be of known reliability in which he refers to conversations he had with you about January of 1947 in which you told him that you had visited Martin Popper the previous evening and had become rather chummy with him, do you wish to comment on that? A. I never became chummy with Mr. Popper. * * *" (R. 435)

In none of these instances was petitioner permitted to confront or cross-examine the informants who supplied the derogatory information against him, yet it can scarcely be claimed that these persons were other than *neighbors* or casual informants having no legitimate reason for remaining unknown to petitioner or his counsel.[19] Petitioner was not even furnished a copy of his oral statement made to two FBI agents several years previously (R. 405-406, 407, 415, 416, 418).

The rule enunciated by this Court in *Gonzales* v. *United States,* 348 U. S. 407, is a rule based on "due process" considerations. *Id.,* at pp. 412-415. And the rule enunciated by the Court of Appeals in *Deak* v. *Pace* (C. A. D. C.), 185 F. 2d 997, and by the Ninth Circuit in *United States* v. *Gray,*

[19] It would hardly advance matters further to show in detail each instance in which petitioner was denied the right to confront and cross-examine adverse witnesses who were neither professional nor under-cover agents within the Communist apparatus. It is sufficient to point out that the Government stipulated that the EIPSB considered "information neither the content, nor source of which has been revealed to [petitioner]." (R. 30)

207 F. 2d 237, at p. 242, is an attempt by the courts to infuse into the government's loyalty-security programs a definition of procedural "due process" in terms of the maximum procedural safeguards which can be afforded an employee without impairing the national security.[20] Cf. Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 241-242 (1956). The Government's argument that to require it "to grant the petitioner access to classified information unless it is willing to disclose the identity of its informers is * * * necessarily to force * * * [the Government] to choose [between] one of * * * two compromises [to] the national security * * *" (*Brief in Opposition to Petition for Certiorari*, pp. 17-18), fails to come to grips with the problem. Furnishing petitioner with a statement of the *findings* of the Hearing Board might have been a laborious, time-consuming or even embarrassing task; it could not have impaired the Nation's ability to protect itself from "internal subversion or foreign aggression." *Cole* v. *Young*, 351 U. S. 536, 544. The very same applies to the "neighbors, maiden-aunts and casual busybodies" who supplied the derogatory information set forth above, and to the report of the conversation between petitioner and two agents of the Federal Bureau of Investigation. Nevertheless, without explaining *how*, the Government baldly asserts that such disclosures would compromise the national security. The mere assertion of this formula is not enough; judicial control of the issues cannot be abdicated to arbitrary action by the Executive in the name of a reason which simply does not apply to this case. *United States* v. *Reynolds*, 345 U. S. 1, 7-11.

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[20] In *Cole* v. *Young*, 351 U. S. 536, this Court defined "National security" as involving "only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." *Id.*, at p. 544.

III

The Industrial Personnel and Facility Security Clearance Regulation Provides No Ascertainable Standard for Judgment.

The standard for denial of a security clearance is a masterpiece of abstraction. If it is not "clearly consistent with the interests of the national security" to grant a security clearance, a clearance will be denied or revoked. *Industrial Personnel and Facility Security Clearance Regulation*, § 11, Appendix "A," *infra*, at p. 29. But what is "security"? And what is in the "interests of the national security"? The definition supplied by this Court in *Cole v. Young*, 351 U. S. 536, 544, is little help. Yet, security hearing board members who administer these regulations are required to interpret this vague, abstract standard, and determine if a granting of a clearance is not only consistent with its meaning, but *clearly* consistent with its meaning.[21]

The Industrial Personnel and Facility Security Clearance Regulation attempts to aid a befuddled board member in the application of this standard by establishing specific criteria which *may* be used as the basis for a denial of clearance, but which need not be used. And even with the aid of these criteria, board members are specifically directed to make their ultimate determination an "overall, common-sense one." *Industrial Personnel and Facility Security Clearance Regulation*, § 12a. This direction is the equivalent of a direction to do as one sees fit; it is

[21] The term "security risk" may be defined as an individual who, by reason of his access to classified information or materials, may intentionally or inadvertently disclose secret information which would find its way into the hands of a potential enemy. Professor Brown describes three general types of potential security risks: "pressure risks", "reliability risks" and "political risks." Brown, *Loyalty and Security*, 254-282 (1958).

vagueness at its worst. Cf. O'Brian, *National Security and Individual Freedom*, 64 (1955). And by directing its board members to make an "over-all, common-sense" determination that the granting of clearance is "clearly consistent with the interests of national security," we think the Defense Department has conceded the uncertainty of its standard.

The criteria made applicable by the "statement of reasons" to petitioner's case (R. 9) are set forth in Subsections 12a(2), (4), (7), (8), (9), (10) and (11) of the Industrial Personnel and Facility Security Clearance Regulation Appendix "A," *infra*, at pp. 30-31. These criteria, designed as aids in arriving at the ultimate "over-all, common sense" determination, serve only to make the standard of judgment more unclear. For example, Section 12a(2) proscribes the activity of establishing or continuing a "sympathetic association" with a spy, traitor, "seditionist," "anarchist," or "revolutionist," or with a person who advocates the alteration of the form of government of the United States by means which need not be violent or forceful—only "unconstitutional." This criterion is filled with ambiguous terms. When the word "revolutionist" is read in context, its possible meanings are sweeping. Apparently, a "revolutionist" need not be an advocate of violent revolution or even an "unconstitutional" revolution. Under this test even an early twentieth century feminist qualifies.

Equally vague is Section 12a(4) which proscribes membership in, affiliation with, or sympathetic association with any organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or "subversive" or which has adopted or shows a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the "form of government" of the United States by "unconstitutional means." *Industrial Personnel and Facility Se*

curity Clearance Regulation, § 12a(4), Appendix "A," *infra*, at p. 30. Again we meet the activity of advocating "alteration of the form of government by unconstitutional means." But these means can be peaceful means. Does the member or sympathizer have to know that the means are unconstitutional? The regulation does not state.

Of special significance is the term "subversive." The words totalitarian, Fascist, and Communist are not easy to pin down, but the meaning of *subversive* is especially elusive. Probably as good a definition of *subversive* as can be found is "tending to overthrow from the foundation." (Funk & Wagnall's New Standard Dictionary.) The word is used in Section 12a(4) to define an organization or group that is something more or less than, but *different from* an organization or group that is totalitarian, Fascist, Communist, or which advocates acts of force to deny other persons their constitutional rights or which advocates the alteration of the present form of government of the United States by unconstitutional means. A good share of normal political opposition can be brought within this definition. See, *Sweezy* v. *New Hampshire*, 354 U. S. 234, 246-247. In this context, Mr. Justice Douglas has pointed out that the term "subversive"

> "* * * will mean one thing to one officer, another to someone else. It will be given meaning according to the predilections of the prosecutor: 'subversive' to some will be synonymous with 'radical', 'subversive' to others will be synonymous with 'communist'. It can be expanded to include those who depart from the orthodox party line—to those whose words and actions (though completely loyal) do not conform to the orthodox view on foreign or domestic policy * * *. Since [these flexible standards] are subject to grave abuse, they have no place in our system of law." (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 176.)

Apart from the uncertainty which permeates the criteria, the Defense Department regulation arbitrarily pro-

scribes rights of association guaranteed by the First Amendment. In arriving at the "over-all, common-sense" determination that clearance be "clearly consistent with the interests of national security" the extent of an employee's associations looms large. Of course, where his associations are such that the ideals and motives of the persons or organizations with whom he associates can *fairly be imputed to the employee himself*, then the *fact* of association has probative value. Cf. *Bridges* v. *Wixon*, 326 U. S. 135. But where the *strength* of the association is less than this it has no probative value. It is the *strength* of the association and not the *fact* of association that is important. Many men belong to a church and are not practitioners of its faith. It takes *devoutness* to the faith of one's church to make one a practitioner of his religion. The regulation's criteria do not make the necessary distinction between the *strength* of an association and the *fact* of association. Yet, while a hundred members of an organization may be disloyal or "risks," the one hundred and first member may be a backslider, a deviationist, or even an FBI informer. This Court acknowledged in *Schneiderman* v. *United States*, 320 U. S. 118, that "men in adhering to a political party or organization do not subscribe unqualifiedly to all its platforms or asserted principles." *Id.*, at p. 136.

Consider Section 12a(11), which was one of the criteria upon which petitioner's revocation of clearance was based:

> "(11) Sympathetic association with a member of, members of, an organization referred to in subparagraph (4) of this paragraph. (Ordinarily, this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)"

Subparagraph (4), referred to in the above criterion, sets forth as unfit those organizations which are any one of the following: totalitarian, Fascist, Communist, subversive, those which have adopted or show a policy of advocating

or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or those which seek to alter the form of government of the United States by unconstitutional means. Section 12a(11) then, sets forth as a criterion for the denial of clearance the activity of associating with another person who, in turn, is a member of one of these vaguely defined organizations. The ideals of the organization are imputed to its member who carries them to the person under examination and infects him with its ideals. It is important to note that only the strength of the association between the two individuals is examined here. The *strength* of the association between the germ-carrier and his organization is not material to a determination under Section 12a(11) that the person under examination is a "risk".[22] This Court has recently discussed the evils of this kind of vagueness as a standard for judgment. *Watkins* v. *United States*, 354 U. S. 178, at pp. 201-206. Indeed, the standard of judgment established by the criteria is so broad (virtually all active intelligent adults are, or have been, guilty of "guilt by association" at least once or twice removed), we think it patently unreasonable. See, *Butler* v. *Michigan*, 352 U. S. 380.

CONCLUSION

Respondents' action in this case finds no justification in the national security interest of the United States. Indeed, their action was destructive of the very interest they sought to protect. In our tradition liberty and security are complimentary, not opposing ideas. "Security is gained through liberty rather than in opposition to it". *Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York*, 27 (1956). Thus, "National Security"

[22] See, *e.g.* Charges 12 and 13 of the "Statement of Reasons" (R. 11).

is not a prop which supports respondents' case. Rather it is the test which demands that the Government's procedures be fair so that our engineers and scientists involved in vital jobs upon which our very survival may depend can serve the Nation with freedom from fear—not only from an "innocently mistaken informer, but from a malicious or demented [one] as well."

By reason of the foregoing the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

INDUSTRIAL PERSONNEL AND FACILITY SECURITY CLEARANCE REGULATIONS OF MAY 4, 1953

* * *

Paragraph 4. *Release of Information.* All Government personnel, including all members of the Boards and the Divisions in the Program, will comply with applicable directives pertaining to the safeguarding of classified security information and the handling of investigative reports; and no classified security information or any information which might compromise investigative sources, investigative methods or the identity of confidential informants will be disclosed to any contractor or contractor employee, or to their counsel or representatives, or to any other person not cleared for access to such information. In addition, in a case involving a contractor employee, the contractor concerned will be advised only of the final determination in the case to grant, deny or revoke clearance, and of any decision to revoke a clearance granted previously pending final determination in the case. The contractor will not be given a copy of the Statement of Reasons issued to the contractor employee except at the written request of the employee involved.

* * *

Standard and Criteria

Paragraph 11. *Standard for Denial of Clearance.* The Standard for the denial of clearance shall be that, on all the information, the granting such clearance is not clearly consistent with the interests of national security.

Paragraph 12. *Criteria for Application of Standard in Cases Involving Individuals.*

a. The activities and associations listed below which may be the basis for denial of clearance are of varying degrees of seriousness. Therefore the ultimate determina-

tion of whether clearance should be granted must be an over-all common-sense one, based on all available information.

(1) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(2) Establishing or continuing a sympathetic association with a saboteur, spy traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(3) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(4) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(5) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law.

(6) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another

government in preference to the interests of the United States.

(7) Participation in the activities of an organization established as a front for an organization referred to in subparagraph (4) above when his personal views were sympathetic to the subversive purposes of such organization.

(8) Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of or sympathetic to the infiltrating element or sympathetic to its purposes.

(9) Participation in the activities of an organization referred to in subparagraph (4) above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

(10) Sympathetic interest in totalitarian, Fascist, Communist, or similar subversive movements.

(11) Sympathetic association with a member or members of an organization referred to in subparagraph (4) above. (Ordinarily this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)

(12) Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in subparagraphs (1) through (10) above. A close continuing association may be deemed to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with such person.

(13) Close continuing association of the type described in subparagraph (12) above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

(14) Willful violation or disregard of security regulations.

(15) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(16) Any deliberate misrepresentations, falsifications, or omission of material facts from a Personal Security Questionnaire, Personal History Statement, or similar document.

(17) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(18) Acts of a reckless, irresponsible or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose security information to unauthorized persons or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the security of the United States.

(19) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(20) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(21) The presence of a spouse, parent, brother, sister, or offspring in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas of such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relatives.

b. Legitimate labor activities shall not be considered in determining whether clearance should be granted.

* * *

Paragraph 16 d. If the Screening Division concludes on the basis of the entire file and in accordance with the standard and criteria set forth in Section III that the case does not warrant a security finding favorable to the contractor or contractor employee, it will, in collaboration with the Security Advisor and the Legal Advisor, prepare a notice of proposed denial or revocation of clearance and a Statement of Reasons which will be as specific and detailed as, in the opinion of the Screening Division, security considerations permit, in order to provide the contractor or contractor employee with sufficient information to prepare a reply. The notice will also forward to the contractor or contractor employee a copy of this directive and will inform him of his right within 10 calendar days from the date of his receipt of the notice, to reply to the Statement of Reasons in writing under oath or affirmation, together with such statements, affidavits or other documentary evidence as he may desire to submit.

* * *

Paragraph 20. *Appeal Division Determination.*

a. As promptly as possible after the hearing, and after full consideration of the complete file, including all evidence, arguments, briefs, testimony and discussions in each case, the Division will meet in executive session and reach its determination under the standard and criteria set forth in Section III.

b. The determination will be reached by majority vote, will be recorded in writing, signed by the members, and will be made a permanent part of the record in each case. If a minority opinion is given, it will also be made a part of the permanent record.

c. The determination will include a finding with respect to each of the statements set forth in the Statement of Reasons.

d. The findings will also include any other statements pertinent to the determination of the case, and a statement in the following form:

> "The Appeal Division determines that, on all the available information, the granting of clearance to ..... for access to classified security information is (is not) clearly consistent with the interests of national security."

e. Decisions of the Appeal Division shall be final, subject only to reconsideration on its own motion or at the request of the appellant for good cause shown or at the request of the Secretary of any military department.

APPENDIX B

INDUSTRIAL PERSONNEL SECURITY REVIEW REGULATIONS

Department of Defense Directive 5220.6

* * *

10. *Industrial Personnel Security Review Board*

a. The Review Board will be located in the Office of Industrial Personnel Security Review and will be responsible for the performance of the duties and functions hereinafter prescribed.

b. The Secretary of each military department will appoint one or more members, military or civilian, to the Review Board as the case load requires. The Director will designate one member to serve as Chairman of the Review Board. Any three members so appointed, one from each military department, will so constitute a quorum-panel that more than one panel may be convened at the same time. One of the members of each quorum-panel must be a qualified lawyer and each quorum-panel will include at least one civilian.

c. The Review Board will have jurisdiction over all cases referred to it in accordance with this regulation.

* * *

21. *Procedure After Determination by the Hearing Board*

a. After the Hearing Board has considered a case and reached a determination, the Executive Secretary promptly will forward the complete file to the Director who will examine it for completeness and compliance with the procedures set forth in this regulation. If the Director is not satisfied with the state of the record in the case, he may return the case to the Hearing Board for further action. In any case in which the Director is satisfied with the record and in which the determination of the Hearing Board is unanimous, he may announce that determination as the final determination of the case. He will notify the person

concerned, the activity initially referring the case, and other interested agencies of this determination. The Director also will issue instructions for the granting, continuing, denying or revoking of clearance in accordance with the determination. If the determination of the Hearing Board is not unanimous, the Director shall forward the case to the Review Board. He also may forward to the Review Board cases which present novel issues or unusual circumstances.

b. The determination of the Hearing Board as announced by the Director pursuant to paragraph a above shall be final subject only to:

(1) consideration by the Review Board at the request of the Director, the Secretary of Defense, or the Secretary of any military department; or

(2) reconsideration by the Hearing Board at the request of the Director on the ground of newly discovered evidence or for other good cause shown.

22. *Action by the Review Board*

a. The Review Board will review each case submitted to it on the written record and will make its determination in each case by majority vote in accordance with the standard and criteria set forth in Section III. It may adopt, modify or reverse the findings or the determination of the Hearing Board. In the event the Review Board modifies the findings or reverses the determination of the Hearing Board, the Review Board determination shall be accompanied by a discussion of the evidence and the reasons relied upon for its action. If the decision is not unanimous, a minority opinion shall be filed.

b. After the Review Board has reached its determination, the Director will notify the person concerned, the activity initially referring the case, and other interested agencies of the final determination in the case. The Director will also issue instructions for the granting, continu-

ing, denying or revoking of clearance in accordance with the determination.

c. Determinations of the Review Board shall be final, subject only to:

(1) Reconsideration on its own motion or at the request of the person concerned, addressed through the Director, on the ground of newly discovered evidence or for other good cause shown;

(2) Reconsideration by the Review Board at the request of the Secretary of Defense or the Secretary of any military department; or

(3) Reversal by the Secretary of Defense, or reversal by joint agreement of the Secretaries of the three military departments at the request of one of such Secretaries.

* * *

24. *Reconsideration of Prior Decisions*

* * *

b. Decisions of the Army-Navy-Air Force Personnel Security Board and of the Screening Divisions of the Eastern, Central and Western Industrial Personnel Security Boards which denied or revoked a clearance may be reconsidered by the Screening Board at the request of the person concerned, addressed through the Director, for good cause shown.

* * *

27. *Changes in Existing Directives*

This regulation supersedes the Industrial Personnel and Facility Security Clearance Program approved by the Secretaries of the Army, Navy and Air Force on 4 May 1953, as amended, and the provisions of any other directives which are inconsistent with this regulation.

APPENDIX C

IN THE

Supreme Court of the United States

October Term, 1954

No. 376

JOHN P. PETERS,
Petitioner,

vs.

OVETA CULP HOBBY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

The Issue

The question before this Court is whether or not an employee holding a non-sensitive, non-policy-making position in a non-sensitive agency of the Federal government is entitled to know the nature, source and substance of the charges against him and an opportunity to confront and cross-examine adverse witnesses, in a proceeding to discharge him from employment on the alleged ground that there is a "reasonable doubt" as to his loyalty.

Inasmuch as the legal and constitutional issues are ably and fully dealt with in petitioner's brief, we believe it un-

ecessary to burden this Court with a repetition of those rguments. Accordingly, our brief will demonstrate the ractical effect of the denial of "procedural due process" n those who have been involved in loyalty-security pro-eedings. We believe that a demonstration of actual in-tances of proven injustice and false and fantastic accusa-ions against individuals who have been involved in these ituations will enable the Court to evaluate the real mean-ıg of the issues posed by this case.

POINT I

Reliance by the Loyalty Board Upon Confidential nformation, the Nature, Substance and Source of Vhich Was Undisclosed to Petitioner, Is a Denial of Due Process of Law.

The Loyalty Board's consideration of secret evidence, ıe nature, substance and source of which was undisclosed petitioner in this case is the rule and not the exception loyalty-security proceedings. Wholly apart from the uestion of the right to confront and cross-examine adverse itnesses, loyalty and security boards rely to a large meas-re on so-called "confidential" information which is gath-red by the Federal Bureau of Investigation and other in-estigative agencies in the regular course of their oper-ions.[9]

The case of "*Charles B. Smith*" an important official of ıe United Nations Secretariat,[10] is an excellent example.

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[9] *Departments of State, Justice, Commerce and the Judiciary Appropriations for 1951*, Hearings, subcommittee of the Committee on ppropriations, Senate, 81st Cong., 2nd Sess. (1950), pp. 136-137.

[10] "*Charles B. Smith*" *Respondent* v. *International Organizations mployees Loyalty Board*, "*Hearing*", Dec. 14, 1953, New York, . Y.; resulting in a determination on Jan. 26, 1954 of "no reason-le doubt as to the loyalty of [Charles B. Smith] to the Govern-ent of the United States." The name "Charles B. Smith" is fic-ious. The true name will be supplied to the Clerk of the Court request.

In the *Smith* case, respondent was alleged to have been employed by the now defunct San Francisco School of Social Studies from 1934 to 1940, under the supervision of Alexander Meiklejohn and that:

> "Information has been received by the Commission to the effect that the School of Social Studies at San Francisco, was actively engaged in the promulgation and dissemination of Communist propaganda; that the interrogation of prospective students by this school reflected that this institution was anxious to acquire pupils inclined to Marxist philosophy * * *" (*Charles B. Smith,* Interrogatory No. VII, *International Organization Employees Loyalty Board,* Oct. 9, 1953).

A request for the source of this accusation was refused but after an exhaustive independent investigation by Smith's attorneys, the charge was found to be based on a verified complaint in a law suit commenced in 1938, in the courts of California, entitled *"Ivan Francis Cox v. 13th District of the Communist Party, et al."* (Complaint No. 278084, San Francisco County, as amended January 20, 1938) wherein it was alleged:

> "That the said sponsors and directors of the said San Francisco School of Social Studies have conspired and confederated together to keep from the public press of the City of San Francisco and the State of California, the true facts surrounding the enunciated purposes and aims of said school, and have otherwise by devious and diverse means attempted to use influence and pressure on several individuals and persons on numerous and sundry occasions with the object and purpose of hiding and concealing the fact that the said San Francisco School of Social Studies is, in reality, a training school for adult organizers of the Communist Party of the United States, and, more particularly the 13th District of said Communist Party, with headquarters at No. 121 Haight Street, San Francisco, California."

In dropping the law suit seven months later, Cox stated, under oath on September 2, 1938, that the suit was instituted in order to "smear" every prominent person in the State of California, including all the Regents of the University of California, that he had been "duped" by a private detective then "wanted" on a warrant for assault, and the detective's attorney (thereafter censured by the California Bar Association); that he knew nothing about the San Francisco School of Social Studies and was induced to commit perjury by the detective and his lawyer.[11] The law suit was then dismissed by the California courts *with prejudice*.

This was the source of the information that branded the "San Francisco School of Social Studies" as "actively engaged in the promulgation and dissemination of Communist propaganda" when it has been recognized by leading educators as one of our most successful early experiments in adult education and that it had no association with any political or economic group whatsoever. Cf. Powell, *"Education for Maturity,"* Hermitage Press (New York, 1949). The source of the information upon which Interrogatory VII in the *Smith* case was heard was not disclosed to Mr. "Smith" and was not known to the members of the International Organizations Employees Loyalty Board even though it could in no way be considered "secret," *United States* v. *Heine* (2 Cir.), 151 F. 2d 813. Fortunately, it was shown to be a complete fraud and hoax; but what would the result have been, if the source of the Charge had not been discovered by Smith's attorneys? What weight would the Loyalty Board have given to Charge VII, which was part of "all the evidence" upon which the Board was authorized to make a determination?

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[11] *Duped by "Red Hunt" Suit, Ivan Cox Charges, Defendant Not Served, Trial Unset. Whole Action Designed Apparently to Smear People He Claims,* San Francisco "Chronicle", August 29, 1938; San Francisco "Examiner", August 29, 1938.

Not so fortunate was *Robert Fulton Waldeck*,[12] a former medical photographer in a Veterans' Administration Hospital in Memphis, Tennessee. Although this employee had no access to classified material and was not in a policy-making position, he was suspended as a "security risk." Charge 3 of the Statement of Charges against him was:

> "* * * association with persons who were members of or affiliated with the Communist Party during the years 1938 and 1939, through your affiliation with the American Labor Party. The American Labor Party is referred to solely for the purpose of identification as to time, place and circumstances."

The employee asked for the names of the individuals allegedly involved in this allegation but was informed that the charge was "as specific and detailed as security considerations, including the need for the protection of confidential sources of information, permit." The employee testified that the only affiliation he had ever had with the American Labor Party was the fact of registration in New York elections in 1938 and 1939, that he had never attended a meeting of the American Labor Party, and that he had never been a member of the American Labor Party. In addition he submitted an affidavit from a former official of the American Labor Party which stated that the American Labor Party was controlled and dominated by anti-Communist trade-unionists until 1944, long after the employee stopped registering to vote "ALP." On October 7, 1954, the employee was informed that the charge was sustained "on the evidence of record," and that he was dismissed, effective October 12, 1954.

Ira S. "Stone,"[13] a former employee of an engineering firm engaged in defense work, was accused, as was his wife,

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[12] *Waldeck* v. *Higley, et al.* (U. S. D. C., D. C.), Civil Action No. 4698-1954, now pending.

[13] Appeal of Ira S. "Stone", Case No. 54-800, now pending before the Appeal Division, Eastern Industrial Personnel Security Board. The name "Stone" is fictitious. The true name will be supplied to the Clerk of the Court on request.

of expressing opinions in favor of Communism and having the reputation of being "pro-Communist." When Mr. Stone's attorneys asked that the Board inform them of the nature and substance of the opinions allegedly express "in favor of Communism," and where and when Mr. Stone and his wife acquired a "pro-Communist" reputation, they were informed by the Board "that the disclosure of the requested information is either unauthorized or unnecessary."

The government's failure to disclose the nature, substance and source of secret evidence, wholly apart from the problem of confronting and cross-examining adverse witnesses, has resulted in the following farcial accusations levelled against individuals involved in loyalty-security proceedings. In one case, an employee was accused of having been on the staff of the "Daily Worker"; investigation disclosed that the staff member of the Daily Worker achieved the same name as the Government employee only by the unfortunate coincidence of marriage. Bontecou, *"The Federal Loyalty-Security Program,"* Cornell University Press, New York 1953, p. 83.

The same writer reports that a bachelor was formally accused of having a Communist wife (*supra*, p. 83); while another employee was accused of advocating the overthrow of capitalism by force and violence, an allegation which proved to relate to his socialist views in college days (*supra*, p. 105). Still another employee was challenged because of a letter he had drafted upon the orders of his superior—presumably on the theory that he had performed this duty in the interests of a foreign power (*supra*, p. 106). Miss Bontecou reports the case of the individual, well known to friends as an active anti-Communist who had opened their eyes to "Party machinations" in labor unions and other organizations, who was accused of placing on his walls, banners emblazoned with the hammer and sickle on which appeared the slogan, "Workers Arise" (*supra*, at p. 113).

Still another piece of nonsense, which would be funny were it not so serious, is the case of a man charged as a Communist because some unidentified informant reported that he had Communist literature in his basement. The literature turned out to be a file of the "New Republic." Joseph and Stewart Alsop, *"We Don't Want Loyal Numskulls,"* Washington Post, August 22, 1948.

Apart from the *Dorothy Bailey* case, the courts that have considered this issue had before them situations where the employees were employed either in "sensitive" agencies or "sensitive" jobs. Nevertheless, they have uniformly held that either "due process" of law or a statutory requirement necessitates that the employee be informed of the nature, source and complete substance of the derogatory information against him. *United States* v. *Gray* (9 Cir.), 207 F. 2d 237, 241-242; *Deak* v. *Pace*, 88 U. S. App. D. C. 50, 185 F. 2d 997; *Parker* v. *Lester* (D. Calif.), 112 F. Supp. 433, 444; *Money* v. *Anderson* (denied cross-examination, employee successfully sued accusers for libel; discharge invalidated because charges insufficient to prepare defense), 208 F. 2d 34; *Manning* v. *Stevens* (D. C. Cir.), 208 F. 2d 827.

* * *

Indeed, non-disclosure of confidential information in civil cases will be permitted only when it is clear that the safety of the nation will be adversely affected. *United States* v. *Reynolds*, 345 U. S. 1, 7, 11.[14] And no less an authority on counter-espionage than General William J. Donovan, wartime head of the O. S. S., has stated:

> "While the Board's conclusion on the importance of protecting the investigatory work of the FBI appears justified, it does not follow that a Government employee must therefore be denied opportunity

[14] Compare rule on non-disclosure in criminal cases: *United States* v. *Andolscheck* (2 Cir.), 142 F. 2d 503; *United States* v. *Beckman* (2 Cir.), 155 F. 2d 580; *United States* v. *Coplon* (2 Cir.), 185 F. 2d 629, 638.

to be informed of the sources of the evidence upon which the charges against him are based. Certainly in practice much more could be disclosed to the employees than is currently disclosed. There seems no reason why the anonymous informant who is not in the regular employ of the FBI and whose testimony is relied on by the Board should not be revealed to the employee. It seems reasonable also that the Board should have the right to subpoena these informants. If non-confidential informants do not want to stand up and be counted, then their information should be used only as possible leads and not be made the basis of a record which cannot be refuted. And where it is impossible to reveal to the employee the *source* of the evidence against him, as in the case of confidential informants, the employee should at least be fully apprised of the *contents* of the testimony." (Donovan & Jones, *Program For A Democratic Counter Attack to Communist Penetration Of Government Service,* 58 Yale L. J. 1211, 1234-1235.)

Thus, wholly apart from the question of the right to confront and cross-examine adverse witnesses, the Loyalty Board's consideration of secret evidence, the nature, substance and source of which was unknown to petitioner, was completely unjustified and constituted a flagrant denial of "procedural due process of law."

POINT II

The Failure to Permit Petitioner to Confront and Cross-Examine "Confidential Informants" Was a Violation of Procedural Due Process of Law.

Respondents' refusal to permit petitioner (holding a non-sensitive, non-policy-making position in a non-sensitive agency) to confront and cross-examine witnesses who testified against him was the result of the alleged need of pre-

venting restriction of F. B. I. investigations (Donovan & Jones, *"Program For a Democratic Counter Attack to Communist Penetration of Government Service,"* 58 Yale L. J. 1211, 1234). Indeed the Bureau is not authorized to obtain statements under oath and informants are assured that their identity will not be revealed. Hoover, *A Comment On The Article "Loyalty Among Government Employees"*, 58 Yale L. J. 401, 404-405.

The consequences of this policy have resulted in the following situations which actually occurred in loyalty-security proceedings: Employee "A" was charged with being "pro-Russian" in his ideas. At the hearing, the informant who had furnished this information testified that he believed that "A" had "pro-Russian ideas" because he had said that unions were desirable things and that Negroes "were entitled to as much as anyone else." Bontecou, *"The Federal Loyalty-Security Program," supra*, at pp. 127-130.

Employee "B" was charged with making the statement: "I prefer the Communist form of government to that which we now have." At the hearing it developed:

> " * * * that the employee had been active in his local civic association and had decided to take some courses in public speaking to help him in his organizational work. In connection with these activities he did a great deal of telephoning from the agency. When he began his course he discovered that the professor had selected communism as the topic around which the class exercises would center, chiefly because he thought it would be easy for the students to find current material on this subject. During the course the employee had clipped material on communism from the papers and had assembled on his desk relevant books from the department library. The material he gathered contained some of J. Edgar Hoover's strong anti-Communist speeches and statements. The fellow employees had noticed the subject matter of the collection, had understood him to

say something on the telephone about "the Communism we teach," and had jumped to the conclusion that he was teaching communism to children in night school. This comedy of errors was completely cleared up through the testimony of all the witnesses at the hearing, including the informants. One of them repudiated the signed statement he had given to the FBI and denied that the employee had said, as reported, 'I prefer the Communist form of government to that which we now have.' " (Bontecou, *"The Federal Loyalty-Security Program"*, *supra*, at p. 130.)

Lloyd "McBride",[15] a Navy Department civilian engineer, was accused of a sympathetic association with a woman identified as a former courier for a Soviet spy ring. This woman and McBride had lived in the same large apartment house in Washington, D. C., at about the same time. On December 8, 1954, a confidential informant who had previously furnished this information to federal investigators testified before the Navy Department's Security Hearing Board *in camera*. The informant testified that McBride and the "former courier" were often together and appeared to be quite friendly. Thereafter, McBride testified that he had never heard of the "former courier" prior to the receipt of the charges in his case, and from what he had recently learned of her description, had never even seen her. In the meantime, and largely through the efforts of the members of the Hearing Board, Board's Counsel, and the Board's Security Officer, the informant agreed to confront McBride at the hearing, testify in his presence, and be cross-examined by his counsel. On December 10, 1954, the informant appeared at the hearing and identified herself as the manager of the apartment building in which McBride had resided. She testified, after

[15] Navy Department Security Hearing Board (Bureau of Ships), December 8, 9, and 10, 1954, Washington, D. C. The name "McBride" is fictitious; the true name will be supplied to the Clerk of the Court on request.

seeing McBride and identifying him as the young man seated opposite her, that the information to federal agents and her testimony before the Security Hearing Board *in camera*, on December 8, 1954, was erroneous and misfaken; that in fact she had never seen McBride with the "former courier"; that she must have confused him with someone else; and that she knew nothing prejudicial or detrimental about McBride except that he and his roommate had invited Negroes to attend parties in their apartment.

In the case of *John Jones*,[16] a respected government employee with many years service, a co-worker informed the FBI that he had heard Jones express Communist ideas to another employee, and that Jones had told the informant that he was going to join a subversive organization. At the hearing, on direct examination by members of the Security Hearing Board, it appeared that the only other witness to either of the alleged conversations was a third employee, since deceased, that the informant had never been displeased by anything Jones had done in their work together, and was simply doing his duty as a loyal citizen.

On cross-examination, however, the informant admitted that he could not recall the nature of the pro-Communist expressed by Jones, except that he was positive that they were pro-Communist; that he did not know what Communism was, "except that it is a form of political party which threatens world supremacy and so on and so forth"; that he did not know what the Communist Party "line" in the United States had been from 1933 to 1954 on any issue; e.g., he did not know whether the Communist Party had been opposed to or in favor of the conviction of members of the Socialist Worker's Party in 1941; whether the Communist Party had been opposed to or in favor of the candidacy of Franklin D. Roosevelt for the Presidency in 1936;

[16] The name "John Jones" is fictitious. The employee does not wish his or his agency's name to be mentioned in this brief. It therefore cannot be furnished to the Clerk of the Court.

whether the Communist Party was opposed to or in favor of the United States' entry into World War II, either shortly before or shortly after June, 1941; and in answer to the question of Jones' counsel: "As a matter of fact, you don't know anything about Communism at all, do you?" the informant answered: "Except what I read in the newspapers." The informant further testified that the subversive organization Jones had told him he was going to join was *Americans For Democratic Action*, and that an attorney-friend of the informant had told him that *Americans For Democratic Action* was "as Communist as Russia itself." Towards the close of the cross-examination (after it had been developed that the informant had at one time been Jones' supervisor and that thereafter, Jones had advanced rapidly in grade, becoming the informant's supervisor), the informant admitted that on several occasions Jones had taken credit for the informant's work.

With respect to a similar situation, the Joint Committee on Atomic Energy has stated:

> "Case A serves as a warning that an informant may perhaps give the FBI highly unfavorable advice but when placed under oath before a local board deny all that he had said, admit that he knows little or nothing about the employee and admit further that he bore him a grudge." *Report, Investigation of U. S. Atomic Energy Commission*, 81st Cong., 1st Sess., (1949) at p. 68.

* * *

In the *Waldeck case*,[18] the employee asked the Veterans Administration for a hearing in the New York City area, his home, inasmuch as his witnesses were unable to travel to the Veterans Administration Hospital at Memphis, Tennessee, the place originally scheduled for the hearing. The request for the change of venue was denied on the ground that numerous witnesses for the government in the Mem-

[18] See note 12, *supra*.

phis area (all or most of them employees or former employees of the Veterans Administration Hospital), had signified an intention to testify at the hearing. When the employee requested that the Board reconvene in New York City after taking the testimony of the government witnesses in Memphis, in order to hear the employee's witnesses who resided in New York, the employee was informed that this procedure was not authorized and his request denied. The employee and his counsel then travelled to Memphis, Tennessee. Immediately after the hearing commenced, the employee was informed that he would not be permitted to confront or cross-examine any witness, nor be informed of their identities (although he knew who some of them were), even though the agency regulations specifically provided that the Hearing Board inform the employee of his right to cross-examine any witness offered in support of the charges and that the employee or his counsel would be permitted to cross-examine all witnesses. The reason given for this action was that while each witness had stated that he would be happy to testify against the employee in private, all of them had informed the Board that they did not "desire" to testify in the employee's presence or be cross-examined by his counsel.

The Board justified its action by interpreting the Veterans Administration regulations (which provided that the employee be informed of his right "to cross-examine any witness offered in support of the charges" and that "reasonable cross-examination of witnesses by the employee or his counsel would be permitted"), to mean that the employee or his counsel was entitled to cross-examine only those "witnesses who appeared before the Board in his presence." Thus, an employee who had been suspended from his job without pay, travelled from New York to Memphis, Tennessee, in the sole hope of proving that his continued employment was no risk to the national security through the cross-examination of adverse witnesses, one of whom he believed by a psycopathic liar, only to find that

since no adverse witnesses "desired" to be cross-examined by his counsel, all he could do was deny under oath the charges against him.

* * *

Perhaps the most striking illustration of the desperate need for confrontation and cross-examination in these cases is to be found in the "*Smith*" proceeding.[19] In that case, "Smith" was charged, among other things, with having attended Communist Party meetings in 1935 and 1939. Inasmuch as counsel had already shown through documentary evidence that the other charges were false or irrelevant, the Hearing Board, displaying an extreme sense of fairness, attempted to secure permission from the FBI to release the informant's name in order to give Smith an opportunity to refute the accusation beyond mere denials. Two days before the hearing, Smith's counsel was informed that the informant's name was Captain Charles G. Bakesy, and that the alleged Communist Party meeting in 1935 took place in Carmel, California, at the home of Ella Winter, then the wife of Lincoln Steffens. During the hearing, the Board Chairman informed "Smith" that Bakesy, on a recheck by the FBI, had withdrawn the accusation that Smith had attended a Communist Party meeting in 1939, but affirmed his prior charge that Smith had attended a meeting in 1935 at the home of Ella Winter. The Board Chairman then asked "Smith" why Bakesy would make such a statement if it were not true. At this point, Smith's counsel asked the Chairman if he knew that Bakesy was a perjurer. When the Chairman said that he did not, and asked counsel if he had such information, counsel asked leave to ascertain what the facts were, and an opportunity to submit evidence on this issue was granted.

Four days later, documentary evidence was submitted that Captain Charles G. Bakesy was a professional witness whose testimony on other occasions had been repeatedly and publicly rejected by government officials as incredible

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[19] See note 10, *supra*.

and unworthy of belief. Bakcsy, who had offered to testify for a fee against Harry Bridges in the 1939 Bridges' deportation proceedings and whose offer had been refused by the West Coast Immigration Director, turned up at the hearing as a defense witness *for* Bridges. Dean Landis, the trial examiner in the Bridges case stated at p. 74 of the "Findings and Conclusions of The Trial Examiner," (a government document printed by the United States Printing Office):

> "Bakcsy testified to other matters also, but his testimony need not be reviewed. Bakcsy failed to carry conviction to the examiner. It is impossible to separate truth from fiction in his testimony. It was bizarre and at times fantastic. It seems best not to permit the testimony of either Captain or Mrs. Bakcsy to play a real part in reaching such ultimate conclusions as must be reached in connection with the matters that are at issue in this proceeding."

If we assume, for the sake of argument only, that Captain Bakcsy was one of the unidentified informants who testified in secret before the Loyalty Board in Petitioner's hearing in the case at bar, the absence of cross-examination and an opportunity to rebut a fantastic accusation made by him against Petitioner resulted in an incredible miscarriage of justice, completely abhorrent to every one of our traditional concepts of "fair-play." For all Petitioner knows, Captain Bakcsy or someone just like him, either testified against him or otherwise supplied the information which resulted in the Loyalty Board's determination that Petitioner was disloyal.

The occasions in judicial history, even in systems in which hearsay evidence is permitted, where this sort of material has been considered as "evidence," are remembered today only as examples of the perversion of the principles of justice. Cf. Pierre Dreyfus, *The Dreyfus Case*, 26 (1937); *United States* v. *Joseph Alstoetter, et al.*, Vol. III, War Crimes at Nuremberg ("The Justice Case"), at p.

1024. This then, is the sorry record resulting from the alleged need of preventing restriction of FBI investigations; the justification being the "national security interest" involved in keeping the identity of confidential informants secret.

We respectfully submit that in the case of the employee holding a "non-sensitive," "non-policy-making" position, there is neither necessity nor justification for withholding one iota of confidential information, or for refusing the employee the right to cross-examine each and every adverse witness. If the government would be embarrassed by such disclosure, the charge on which it is based should be withdrawn [21]—in the "non-sensitive" positions there is no need to tolerate an obliteration of the Constitution and the essence of fair procedures. In "sensitive" jobs, which involve either access to classified material or other information important to national defense and foreign relations, or in "policy-making" positions in these areas, the professional or "under-cover" informant should be separated "from neighbors, maiden-aunts, and casual busybodies who have no legitimate reason for secrecy." [22] If it be claimed in answer to this simple solution that the private citizen would then be unwilling to supply testimony important to the safety of the nation, Congress has ample authority to give loyalty-security boards the power of *subpoena*. Poorly drawn, slip-shod and politically expedient loyalty-security regulations do not sit well in answer to the documented claim that the fundamental liberties of so many people are fast becoming as extinct as the bison.

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[21] Cf. *United States* v. *Coplon* (2 Cir.), 185 F. 2d 629.

[22] Lewis, *Our Security Procedures Need Not Be Unfair*, "The Reporter", November 4, 1954, at p. 23.